IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

WILLARD UPHAUS,

Appellant

v.

LOUIS C. WYMAN, Attorney General,
State of New Hampshire,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT.

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

JURISDICTIONAL STATEMENT.

Appellant, Willard Uphaus, appeals from the judgment of the Supreme Court of New Hampshire entered on March [redacted], 1960, which sustained a Superior Court judgment of contempt committing him to jail for refusing to produce for appellee's inspection approximately 600 cards showing the names and addresses of persons who attended, during the years 1954 and 1955, a summer camp called "World Fellowship" of which appellant was the director.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinions Below.

The opinion of the Supreme Court of New Hampshire (R. 111) is reported in 102 N. H. 461, 159 A. 2d 160, and appears in Appendix A as rendered on March 31, 1960. A motion for bail was denied by that court on June 27, 1960, with an opinion (R. 197; not yet reported) which appears in Appendix B. There was no opinion in the Superior Court.

Jurisdiction.

On June 8, 1959, this Court held that appellee, by virtue of authority theretofore granted to him by the New Hampshire legislature and still in existence when the issues on that appeal were made up, had a right to compel disclosure of the names of all persons who attended the camp, for the purpose of ascertaining (and reporting to the legislature) "whether subversive persons • • • are presently located within this state". 360 U. S. 72.

On remand, appellant brought to the Superior Court's attention a supervening change in the New Hampshire statutes (effected after the filing of the original notice of appeal to this Court), greatly narrowing appellee's investigative authority. Although there precluded, by this Court's decision, from questioning appellee's *original* authority to demand the names, appellant contended on statutory and constitutional grounds that he could not *then* be committed to jail in a civil contempt proceeding designed to coerce the production of the information, the basis of such contention being that the legislature had terminated appellee's authority to make such an investigation on its behalf. The contention was rejected December 14, 1959, and a further demand was made on appellant

for production of the 600 cards bearing the names of the guests. As before, he refused to produce them on grounds of conscientious and religious scruple, saying (R. 13-15):

> "Your Honor, on January 5th [1956], I believe it was, in this court room, I said that there is no question in my life to which I have given more thought, more prayer, more consultation; no question in my life for which I have sought counsel more deeply and sincerely—religious counsel, legal counsel, the counsel of friends. Four years have transpired since that time. World Fellowship has had four successful seasons. It has brought many friendly people from different states in the United States, and from other countries in the world to Fellowship, to recreate in the pleasant environment, and to discuss the problems which mankind faces today. At no time did any guest at World Fellowship express or even suggest or intimate that there was the thought in their minds of subversion or of any organized effort to overthrow the State of New Hampshire or the United States. In fact, throughout each summer it was solely the welfare of this state, and of this nation and the people in the world, with which we were concerned.
>
> "Today, your Honor, the Bill of Rights is a part of my life—and I wish to uphold it. I today wish to uphold the Constitution of the State of New Hampshire, which says specifically that we are guaranteed the right of conscience. I am proud to uphold the Constitution of New Hampshire today. And, your Honor, I do not feel that in this instance what I regard as loyalty to God and to the Bible—*this abhorrence of bringing innocent people into public scorn and even possibly the loss of a livelihood*—I do not today regard this as out of relationship to my own loyalty to my country, and I stand solidly upon the Constitution of the United States and upon the Bill of Rights. I am strengthened by the opinion

of the minority of the United States Supreme Court which held that the investigation was held for the sake of exposure. I am helped by that finding when it says that I and World Fellowship have not violated constitutional law; that we were merely meeting there to discuss problems of economics, religion and society, so in this instance today my loyalty to God is not in contradiction with my loyalty to this state and this country, because I do not feel that I am standing against the law of my land. It is not defiance of the order of the Court; it is standing in the presence of history. It is standing in the presence of historical law; it is standing in the presence of moral law; it is standing in the presence of our heritage. I hope to see the day, your Honor, when the laws—either federal or state—that inquire into the thoughts of men and women and interfere with their free and peaceable assembly will be declared unconstitutional. I repeat that I stand upon the basic historic moral foundations of our democracy and of our country, and upon my conscience.

"Let me indicate that in addition to finding this strength in the minority opinion of the Supreme Court, I must indicate to you that what I do is not something—does not grow out of something that occurred to me yesterday or the day before or the first hearing of the Attorney General; it grows out of sixty-nine years of living; it grows out of the influence of a grandfather—a minister; it grows out of Christian parents; it grows out of a long, long life in the church, and it is in this tradition that I stand today—this tradition found in Judaism, in the early church, and at various times in the history of the people, that it is mean and contemptible to bring innocent people into public scorn and into possible loss of livelihood. This is seated deeply in the Old Testament. It is seated deeply in the early life of the church—and it appears again and again. My source is not only the Bible and what I know about religious history; my source today is the July, 1957 issue of Theology Today, in which Professor

George Williams, Professor of Church History at Harvard University, pointed out more clearly to me than I have ever seen before, that to bring innocent people into public scorn, into difficulty, into embarrassment, into the headlines of the papers, would be in violation of this great historic tradition.

"Your Honor, it is not my purpose here today to be defiant or to be stubborn, or to be contentious, or to put myself above the rulings of the courts. And I might remind you that the courts have changed their opinions over the years. It is not that. So therefore, your Honor, before God and before my friends here, I can do nothing else than to say no." (Emphasis added.)

The following order of committal was thereupon entered (R. 22):

"The rulings and findings of January 5th, 1956 are affirmed, thus ruling that Willard Uphaus is found and adjudged in contempt of this Court. Willard Uphaus is ordered committed to the Merrimack County Jail and there to remain for one year from this date or until he purges himself of contempt, or until further order of this Court."

Appellant excepted to this ruling and appealed to the New Hampshire Supreme Court. On March 31, 1960, that Court overruled his exceptions and affirmed the judgment and committal order of the Superior Court (R. 111). The notice of appeal was filed in the New Hampshire Supreme Court on June 20, 1960 (R. 183).

Motions for bail pending appeal were denied both by the Superior Court and by the New Hampshire Supreme Court, and appellant has remained in jail since December 14, 1959.

Jurisdiction of the appeal is conferred on this Court by 28 U. S. C. §§1257(2) and 2101(c). The following cases

sustain the jurisdiction of this Court: *Hamilton* v. *Regents of the University of California*, 293 U. S. 245 (1934); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Garner* v. *Los Angeles Board*, 341 U. S. 716 (1951); *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956); *Uphaus* v. *Wyman*, 360 U. S. 72 (1959).

Statutes Involved.

The validity of the following New Hampshire statutes (set forth in Appendix C) is involved:

(1) New Hampshire Laws, 1953, c. 307, approved June 17, 1953, granting appellee *temporary authority* to investigate and report to the legislature "with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state."

(2) New Hampshire Laws, 1955, c. 340, approved January 13, 1955, extending said authority to April 30, 1955.

(3) New Hampshire Laws, 1955, c. 197, approved June 14, 1955, extending said authority to June 30, 1957.

(4) New Hampshire Laws, 1957, c. 178, approved and effective June 14, 1957, granting appellee *permanent authority* to investigate and report to the legislature as to violations of the subversive activities act of 1951.

(5) New Hampshire Revised Statutes Annotated c. 491:19 and c. 491:20, authorizing the superior court to order the "production of things" upon petition of officials and boards who are empowered to take testimony but who are not empowered to "punish for contempt," the court being authorized "to proceed in the matter as though the

original proceeding had been in the court, and * * * make orders and impose penalties accordingly."

Questions Presented.

1. Whether a legislative demand for the public naming of hundreds of individuals, in a context which will inevitably result in their exposure to private retribution for exercise of the right of peaceable assembly, is forbidden by the due process clause of the Fourteenth Amendment and by the prohibition upon bills of attainder in Article I, Section 10 of the United States Constitution, in the absence of a concrete showing that identification of such persons can be expected to aid the legislative process.

2. Whether the due process clause of the Fourteenth Amendment forbids persistence in such legislative exposure after expiration of the temporary statute on which the demand for exposure was based.

3. Whether, in the absence of any showing of specific and compelling public need for such exposure, the due process clause of the Fourteenth Amendment forbids the imprisonment of a witness who refuses on grounds of religious and conscientious scruple to participate in the public identification of persons whose names the legislature seeks for the sole reason that they have accepted his invitation to a peaceable assembly.

Statement of the Case.

Appellee, acting as a one-man legislative "committee" pursuant to authority granted him by the New Hampshir legislature in 1953 and extended in 1955 by the new legislature which took office in that year, undertook an investigation of World Fellowship, a summer camp in New Hamp-

shire, of which appellant was the Director. In the course of that investigation appellee examined appellant at length in "Executive Session" hearings held in 1954 and 1955, on the subject of subversion or possible subversion. Appellant answered without reserve all questions about his own affiliations and actions and the activities at the camp. On grounds of conscience he refused to provide three categories of information: (1) the names of nonprofessional employees at the camp, such as cooks and cleaning women; (2) correspondence between appellant and persons who came to the camp as speakers; and (3) the names of all persons who attended the camp in 1954 and 1955—about 300 in each year. The state courts upheld appellant as to category (1), and there has been no final state court judgment as to category (2). This appeal, like the previous one, therefore concerns category (3) alone—the names of several hundred guests, which, for the reasons of conscientious and religious scruple stated above, appellant has refused and does refuse to produce.

The proceedings in the New Hampshire courts subsequent to this Court's decision on the prior appeal have been described above.

SUBSTANTIALITY OF THE QUESTIONS

I. The decision on the prior appeal, upholding the power of legislative exposure without a showing of specific legislative need, is erroneous and should be overruled.

We consider it our duty to request that the decision on the prior appeal be reconsidered and overruled. We are encouraged in this by Mr. Justice Frankfurter's wise reminder, in his dissent in *Harris* v. *United States*, 331 U. S. 145, 156 n.2 (1947), that "a constitutional adjudica-

tion of recent vintage and by a divided Court may always be reconsidered". See also *Kovacs* v. *Cooper*, 336 U. S. 77, 89 (1949) (concurring opinion). As will appear in Point II hereof, the present appeal raises new issues which would require reversal even if the prior decision were allowed to stand. But we respectfully submit that, unless and until it is overruled, it will constitute a present and continuing impairment of basic constitutional rights of the whole American people.

The broad issue in this case is whether the constitutional rights of free speech and peaceable assembly are to be reserved for heroes or whether they are to be available to all Americans—the timid as well as the brave. There are more ways than one of rendering speech and peaceable assembly extra-hazardous activities. The most direct and obvious way is to accept the doctrine of guilt by association, whereby criminal liability or civil disability can be imposed on a man simply because of the company he keeps. This Court having sternly and repeatedly declared that our Constitution forbids this particular means of discouraging group activity, we are now beset by a host of subtle stratagems directed to the same end but cloaked in ostensibly non-punitive form.

State officials tell us, for example, that the *names* of members of and contributors to the N. A. A. C. P. must be spread on the public records so that state regulation of foreign corporations and collection of municipal license taxes can be accomplished. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *Little Rock*, 28 U. S. L. Week 4102 (1960). We are told that controversial handbills must carry the *names* of their printers and distributors so that circulation of obscene, libelous, fraudulent and otherwise objectionable printed matter can be prevented. *Talley* v. *California*, 28 U. S. L. Week 4186 (1960). And

in the present case we are told that the *names* of the several hundred people who attended a pacifist camp in 1954 and 1955 must be exposed to public view so that a sovereign state can enact statutes to protect itself from forcible overthrow. Always the *names*.

This Court has been quick to recognize the significance of this prepossession with public identification of individuals who have somehow had contact with persons or groups suspected of unpopular or unorthodox views on controversial subjects such as race relations and world peace. Such individuals cannot be convicted of crime without proof that they have done, or attempted, or conspired at, some illegal *act;* the Constitution forbids. The question is whether, in lieu of criminal punishment, they can be tagged with an inflammatory label—"subversive" or "integrationist"—and thus rendered visible targets, open to the fury of private zealots.

Such exposure is no less than a modern version of the pillory. Whether the state exposes a dissenter in the town square to be pelted with stones and taunted with epithets, or by scornful public identification exposes him to social ostracism, loss of employment, economic boycott, and general harrassment, the effect is to proclaim a general warning—a warning that participation in discussion and group action on the burning public issues of the day, far from being the free birthright of all Americans, is burdened with a heavy price. In a word, it is *punishment*.

Recent decisions have done much to dampen this new assault on those basic constitutional liberties which keep the government in its proper place as servant of the people rather than their master. With unanimous voice this Court has taken cognizance of the danger that the exposure technique may reduce the right of peaceable assembly and association to an empty form of words. After noting

that "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and after reviewing prior decisions protecting the rights of advocacy and association from indirect attrition, the Court laid bare the specific operation of the exposure technique in these words (*N. A. A. C. P.* v. *Alabama, supra,* 357 U. S. at p. 462):

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized *the vital relationship between freedom to associate and privacy in one's associations.* When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds, supra,* [339 U. S. 382] at 402: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. *Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.*" (Emphasis added.)

Nor did the Court accept the pious disclaimer of state responsibility for the private vengeance made possible by official exposure. It declared (*id.*, p. 463):

> "It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in

> petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."

The Court has had little difficulty in detecting and repelling unwarranted attacks on associational privacy under color of state law, where they have been made in a context which required the state to make explicit the nature of the public need on which the demand for exposure was based. In *N. A. A. C. P.* v. *Alabama*, *supra*, the demand was for discovery in a judicial proceeding, and the asserted public need could be measured against the issues framed by the pleadings. In *Bates* v. *Little Rock*, *supra*, the demand was made pursuant to tax ordinances which, by defining the purported public interest, made it possible to determine the presence or absence of a genuine need for publicity. In *Talley* v. *California*, *supra*, the demand was likewise embodied in an ordinance whose broad reach could be tested against the public interest which was claimed to justify it. And in all of these cases the demand for exposure was rejected on the ground that the defined public need could be satisfied by alternative means which would leave the right of associational privacy intact.

The sole deviation from this consistent pattern has occurred on the prior appeal of the present case, where the demand for exposure has been made in the course of a legislative investigation. Such investigations, by their very nature, are devoid of concrete issues. The need for exposure cannot be tested against a public need defined by judicial pleading or against a declared public policy defined by statute or ordinance, since the very purpose of a normal legislative investigation is to ascertain whether

and how the law should be changed. Therefore, when called upon to decide whether knowledge of the identity of the several hundred people who attended the World Fellowship camp in 1954 and 1955 was really needed by the New Hampshire legislature for lawmaking purposes, the Court had two alternatives. On the one hand, it could have held that since the legislature itself had failed to give a concrete explanation as to how the names might help it in its work, this missing link must be supplied by appellee at the bar of this Court. The other alternative, which the Court adopted, was to hold that the very formlessness of the legislative investigation makes it necessary to appraise the demanded exposure not in terms of its specific relationship to a defined public purpose, but in terms of the legislature's constitutional competence to enact laws in the general field being investigated. And, the Court being of the opinion that some residual state competence in the control of subversion has survived Federal pre-emption of the major aspects of this subject matter (*Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956)), it upheld the demand for exposure on the ground that there was some possibility of a "nexus between World Fellowship and subversive activities." The absence of any effort to show how the public naming of World Fellowship's guests could be useful to the legislature was deemed immaterial.

We respectfully submit that this softening of the standard which the Court has applied in other cases (before and since) for detecting and curbing the exposure technique, has opened a wide and potentially disastrous breach in our constitutional defenses against officially imposed orthodoxy. The scope and effect of the decision can perhaps be more fully appreciated if we see what it must mean to a man who takes seriously the admonition of Mr. Justice Brandeis (dissenting in *Gilbert* v. *Minnesota*, 254 U. S. 325, 337-338 (1920)):

> "The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so 'the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government' would be a right totally without substance. See *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Slaughter-House Cases*, 16 Wall. 36, 79. *Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself.* Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." (Emphasis added.)

Such a man is now put on notice that before he can safely participate in a wholly lawful discussion of such a vitally important subject as world peace, even at a privately operated summer camp, he must first obtain a full and accurate report of the organizational connections of all other participants in the proposed discussion. Even this is not enough. He must obtain similar information about everyone who has attended the camp in the past or may attend it in the future. If any of these people have ever been affiliated with organizations suspected of subversive tendencies, he runs the risk that the state legislature may *thereafter* elect to investigate some supposed threat to the security of the state and, in the course of such investigation,

proclaim him to the world as a "subversive person"—or perhaps, charitably, as one whose loyalty can neither be affirmed nor denied on the evidence at hand but who needs watching because of his unwise choice of associates.

It will be noted that the suffocating effect of the decision is not limited to New Hampshire. As we read the Court's opinion on the prior appeal, nothing now prevents *any* state legislature (or the Federal Congress, for that matter) from investigating and exposing past as well as future discussion groups—with no greater demonstration of public need than a hearsay "showing" of some ground for suspecting past or present subversive tendencies on the part of some one or more of those present.

We say that such an overhanging danger, even if it actually materializes only sporadically and in times of general anxiety and stress, is enough to discourage all but the most stout-hearted from full acceptance of their political responsibilities. There are nations where anyone who manifests an interest in public matters lays hold of a live wire, and must risk grave consequences if his views are out of harmony with the current official viewpoint. As a result, they are nations of sheep. We are now threatened with a similar prospect. Never since Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. 357, 375 (1927), warned that "the greatest menace to freedom is an inert people", has the very basis of vigorous self-government been so deeply in jeopardy.

It will not do to say that associational privacy is an "individual" right which can weigh but lightly against the "governmental interest" in security against insurrection and invasion. To be sure, the right of privacy is ordinarily asserted by private individuals in litigation with public officials who speak in the name of the government. But those private individuals stand as defenders

of the sovereign status of the whole people. The constitutional protection is not invoked for the sole benefit of the particular party litigant. It is invoked in defense of the very shape of our society.

In order that the American people may remain masters of their government, we respectfully submit that the decision on the prior appeal should be reconsidered and overruled.

II. The declaration of legislative interest which was previously held to justify the demand for exposure has now been withdrawn.

While the majority opinion on the prior appeal dispensed with the necessity of a showing that exposure of the names could reasonably be expected to further the declared legislative purpose, it did at least make clear that the exposure was permitted solely because of the state legislature's declared desire to be informed as to whether "subversive persons" were then located in the state.

The opinion of the Court is quite clear on this point. It characterized the investigation as "an effort by the Legislature to inform itself of the presence of subversives within the State and possibly to enact laws in the subversive field." The central question was stated in the following terms:

> "The interest of the guests at World Fellowship in their associational privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones. Whether there was 'justification' for the production order turns on the 'substantiality' of New Hampshire's interests in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts. *National Association for the Advancement of Colored People* v. *Alabama, supra.*

> "What was the interest of the State? *The Attorney General was commissioned to determine if there were any subversive persons within New Hampshire.* The obvious starting point of such an inquiry was to learn what persons were within the State. It is therefore clear that the requests relate directly to the Legislature's area of interest, *i.e.*, the *presence of subversives in the State,* as announced in its resolution." (Footnotes omitted; emphasis added.)

Again and again the opinion stresses the point that the demand for the names was being upheld because of the declared legislative interest in the presence of "subversive persons". Nowhere is it suggested that the investigation could be justified as a means of discovering *violations of law*—the other subject matter as to which the legislature, in its 1953 and 1955 statutes (which alone were then before the Court), had directed the attorney general to investigate and report.

Under Rule 10(2) of the Rules of this Court, the previous appeal was necessarily limited to the questions comprised in the notice of appeal. Said notice of appeal was filed April 26, 1957, and the case was briefed, argued and decided in terms of the New Hampshire statutes as they existed at that time. After the issues had thus been made up, however, the New Hampshire legislature materially narrowed the appellee's power to investigate on its behalf. Chapter 178 of the New Hampshire Laws of 1957 (approved June 14, 1957, and effective the same day) withdrew appellee's power to make investigations as to the *presence of subversive persons* within the state, and limited his inquiries to the subject of *violations of the sedition law*:

> "At any time when the attorney general has information which he deems reasonable or reliable relating to violations of the provisions of this chapter he

> shall make full and complete investigation thereof and shall report to the general court the results of this investigation, together with his recommendations, if any, for legislation."

It cannot be reasonably denied that the change was a material one. Chief Justice Warren, speaking for four members of this Court in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 246-247 (1957), has analyzed the pre-1957 statutes and has taken note of the fact that the authority to ascertain the presence of subversive persons was far broader than the authority to investigate violations of law. He declared (and on this point no member of the Court disagreed with him):

> "The Attorney General was instructed by the legislature to look into violations of that Act. In addition, he was given *the far more sweeping mandate* to find out if there were subversive persons, as defined in that Act, present in New Hampshire" (Emphasis added.)

Two concrete examples may help to illuminate the Chief Justice's point. The term "subversive person," as defined in the statute, includes any member of a "subversive organization" (as defined)—regardless of whether the member has any knowledge of the organization's subversive purposes. Suppose a man joined one of the organizations (in New Hampshire or elsewhere) which appellee, in his 1955 Report to the New Hampshire Legislature, considered to be worthy of legislative attention—perhaps a Parent Teachers Association which had been "infiltrated" by the Communist Party (Report, p. 188). Suppose also that this man had no knowledge of the "infiltration" of the organization and simply joined in the naive belief that he owed it to his children to take this interest in the affairs of

their school. Suppose, further, that this man had then taken his family on a vacation trip to New England and, happening to reach the vicinity of Conway, New Hampshire, by nightfall, had seen the World Fellowship sign inviting his patronage and had put up for the night there, signing or having his name entered upon the usual guest registration card. Suppose, finally, that his only activity in the camp consisted of bedding his family down, getting a night's sleep and leaving at daybreak—all without reading anything or having any conversation with anyone except perhaps the registration clerk.

Under the legislation as it existed prior to June 14, 1957, the New Hampshire legislature must be assumed to have had an active interest in the presence of this man within the State. The actions described above did not, of course, constitute a violation of the New Hampshire sedition statute or of any other law, state or Federal. On the other hand, the legislature—until June 14, 1957—wanted to know the identity and whereabouts of such people, presumably on the premise that anyone who had come into contact with a seditious organization (however innocently) needed watching, and that the appellee should therefore ascertain the fact of his presence, report it to the legislature with a description of his affiliations, and—incidentally and regrettably but necessarily—identify him to the whole world as a "subversive person."

Consider a second example. World Fellowship is a place of public accommodation, advertising its facilities to the general public and offering lodging to anyone who wishes to sojourn in this attractive vacation area.* Suppose a man went there for a day or two simply for rest and

* Note the wording of its sign: "All races, colors, countries, convictions, welcome. $4 to $7 a day." Record on previous appeal, p. 70. It is entirely possible that some guests have put up at the camp solely because of the absence of racial restrictions encountered elsewhere.

recreation. Suppose further that he had no interest whatever in public affairs, never discussed them in his life, and never belonged to any organization except perhaps the Sons of the Revolution and the American Legion. Presumably appellee, upon learning these facts, would give him a clean bill of health. Yet, in view of appellee's insistence that the legislature had a right to know that New Hampshire is *not* infected with "subversive persons" (if that is the fact), as well as to know the contrary (see appellee's Brief on the previous appeal, p. 32), appellee could hardly refrain from making a public report detailing the above facts. The necessary consequence would be to inform the world at large that this man had spent part of his vacation at a camp operated by an organization which the New Hampshire Attorney General had declared to be subversive. It can hardly be assumed that no harm to the individual would result.

Considering the tremendous reach of such an investigation, and its obviously dangerous potentialities, it is understandable that the New Hampshire Legislature refrained from authorizing it except on a temporary basis—presumably to cope with some current emergency which was believed to exist. The temporary legislation enacted in 1953, authorizing the sweeping inquiry as to the presence of "subversive persons" within the state, was limited on its face to investigation "during this session of the 1953 legislature, recess and adjourned periods" (N. H. Laws of 1953, c. 307); and the 1955 extension of this authority continued only until June 30, 1957 (N. H. Laws of 1955, cc. 197, 340).

When the legislature finally enacted a permanent statute on the subject (N. H. Laws of 1957, c. 178) it terminated this broad authority. Whether it did this because the extraordinary power theretofore granted to the Attorney General was deemed too dangerous to be extended for the

indefinite future, or because of dissatisfaction with the manner in which the power had been exercised or with the paucity of legislative recommendations which had resulted from appellee's efforts, we cannot know with certainty. What we do know is that appellee's authority, as a "committee" of the legislature, to investigate the presence of subversive persons in New Hampshire, terminated in June, 1957.

It might have been supposed that appellee, who from the beginning has claimed investigatory power solely in the name of the legislature whose agent or delegate he is, would have recognized the narrowing of his authority and would have withdrawn his demand for the names. But upon remand of the case to the Superior Court after this Court's decision, he renewed that demand. Appellant immediately brought the new statutory situation to the Superior Court's attention and moved to dismiss the case as moot, claiming that enforcement of the demand at the sole instance of appellee, after termination of his legislative mandate to obtain it, would vest this single official with such broad and arbitrary power as to violate the due process clause of the Fourteenth Amendment (R. 8). Appellant's motion to dismiss was denied, however, and he was forthwith committed to jail.[4] The federal due process claim was preserved in appellant's exceptions and brief on appeal to the New Hampshire Supreme Court (R. 92) and was necessarily passed on and rejected by it.

The opinion of the New Hampshire Supreme Court affirming the judgment and order of committal (Appendix A) makes it quite clear that appellee's authority was deemed to flow from the state statutes. It refers to the 1957 statute as showing continuation of the legislative interest in "subversive *activities*"—as indeed it does—but ignored the plain and highly significant distinction between

engaging in a subversive *activity* and being a "subversive *person*" within the sweeping definition of the statute. The opinion, standing by itself, suggests that the commitment was being upheld under the 1957 statute though it does not expressly say so.

Appellant then moved for bail pending appeal to this Court, and shortly thereafter filed his notice of appeal (R. 117, 183). Both the motion and the notice made plain the entirely new questions presented by omission from the 1957 statute of the very provision which had served as the basis of this Court's decision. Finally, on June 27, 1960, the State Supreme Court rendered an opinion stating unequivocally that the commitment was based solely on the 1955 statute which was in effect when the Superior Court first ordered disclosure of the names (see Appendix B):

> "Our opinion of March 31, 1960, did not turn upon any holding that RSA 588:8a provided an extension of the legislative investigation first authorized in 1953. The plaintiff stands committed for refusal, while Laws 1955, *c.* 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a."

For jurisdictional purposes it makes little difference whether the committal order and judgment be deemed to rest on the 1955 statute (as implemented by RSA 491:19 and 491:20, providing for judicial enforcement of the subpoenas) or the 1957 statute (as similarly implemented). In either event the validity of a state statute is "drawn in question • • • on the ground of its being repugnant to the Constitution • • • of the United States, and the decision is in favor of its validity." 28 U. S. C. §1257(2).

Whichever statute appellee may choose to rely on to support the commitment, it is plain that new and substantial Federal questions are presented. If he relies on the 1957 statute, he is faced with the impossible task of explaining how it would help him discover *violations of law* to learn the names of several hundred persons who, so far as the record shows, have done nothing to justify even the remotest suspicion that they have been a party to any act of a type which is or could constitutionally be made illegal. All that is known is that they had some undefined contact, five or six years ago, with a suspected organization. The New Hampshire legislature itself abandoned any interest it may have had in their particular identity, long prior to entry of the committal order and judgment now under review.

All the legislature requests, in the 1957 statute, is information as to violations of law. A search for such violations by obtaining the names in question would be a fishing expedition pure and simple. Nothing in this Court's decision on the prior appeal forecloses appellant's contention that a wholesale invasion of privacy for such a purpose, in the absence of any reason to think that illegal acts would thereby be uncovered, is a denial of due process of law.

Appellee's position is even weaker if he relies on the theory announced by the state Supreme Court in its opinion of June 27, 1960 (Appendix B), justifying the commitment on the sole ground that it was legal when originally entered on January 5, 1956, more than four and a half years ago. This must mean that the 1955 statute has been interpreted to vest appellee with an authority which outlasts his authority as an investigative agent for the legislature. And what can this be, except a power either to ferret out names for *his own* purposes (which this Court certainly has not held he can be lawfully authorized to do), or else to vindicate the authority of the 1955 legislature by persisting in an investigation which, having been stripped of

all remedial significance, can only be explained as a punitive measure (which this Court likewise has not sanctioned)?

One curious effect of reliance on the 1955 statute is to render the legislative interest immaterial except at the very outset of the investigation. In *Sweezy* v. *New Hampshire, supra*, four members of this Court held that the legislature had exceeded constitutional limits by abdicating its normal function of deciding whether particular items of information demanded by appellee on its behalf were really needed for its own purposes. In the view of these four Justices, the delegation of this function to appellee had the effect of relieving the legislature from public responsibility for exercise of the exposure power, and thus did away with a normal and essential safeguard against abuse.* But the proposed interpretation of the 1955 statute goes much farther. Not only does it relieve the legislature of the *duty* to supervise its agent's exercise of the broad and vaguely defined power it has vested in him; it eliminates the legislature's *power* to do so.

A brief recapitulation of the actual sequence of events in this case will show how completely the legislature has been deprived of control of its own investigations. In 1955 it continued, until the middle of 1957, the general investigatory authority initially granted to appellee in 1953. Pursuant to this authority appellee examined appellant in "Executive Session"—private proceedings which the legislature could not have supervised even if it had been sitting at the time, which it was not. Appellee then went to court and on January 5, 1956, obtained an order for disclosure of the names. At that moment the legislative mandate dropped out of the picture. All that mattered from then on was the court order.

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* It may be noted that no witness can be proceeded against for contempt of either house of Congress, either criminally under 2 U. S. C. §192 or by direct civil process, without approval of the house itself (or its presiding officer acting on its behalf).

The New Hampshire legislature is not a continuing body; it is wholly reconstituted every two years, all members of the Senate as well as the House of Representatives being elected biennially. New Hampshire Constitution, Part 2, Articles 9 and 25. The authority granted by the vanished legislature of 1955 was necessary to enable appellee to bring this case before the Superior Court, but at that point its power to direct and control the investigation terminated. The logical consequence of the New Hampshire Supreme Court's opinion of June 27, 1960 (Appendix B) is that by virtue of the 1955 statute appellee could persist in the effort to expose World Fellowship's guests, with the coercive aid of the Superior Court, even if the present legislature were to declare itself wholly uninterested in his efforts and were to terminate his investigatory power entirely.

A more complete diffusion of public responsibility can hardly be imagined. Appellee, if criticized for the wanton invasion of associational privacy which has occasioned appellant's commitment, can say (and consistently has said) that he seeks the names not for himself but for the legislature, and that it is not he but the Superior Court Judge who decides the nature and severity of coercive orders in aid of the investigation. That Judge, if asked how exposure of the names can serve a public purpose, can simply reply that this is the legislature's problem, not his. And the legislature, if asked the same question, not only can disclaim responsibility for initiating the demand for the names (inasmuch as the matter was taken to court long before the present legislature came into being), but also can deny its own power to limit or stop any aspect of the investigation which has reached the stage of a judicial compliance order. All possibility that abuses of power might be checked by an aroused public opinion

thus disappears entirely. The compliance order has become a blind Juggernaut, set in motion by the departed 1955 legislature but rolling now by its own momentum, uncontrollable by the present legislature.

But, it will be said, appellant cannot be permitted to flout the authority of the Superior Court and then go unscathed simply because, during the years consumed in litigation, an originally valid compliance order has now ceased to serve any lawful purpose. Such a view would have weight if this were a criminal contempt proceeding. It is by such proceedings that courts vindicate their dignity and protect their authority. Appellant's commitment, however, is based on a civil contempt order; and such an order, by definition, is made for the benefit of a contending litigant—as a means of obtaining specific enforcement of some right possessed by him—rather than for the benefit of the court. That is what "civil" means. As was said in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441-443 (1911):

> "Contempts are neither wholly civil nor altogether criminal. • • • It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.
>
> • • • • • •
>
> "The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.
>
> • • • • • •
>
> "It is true that either form of imprisonment has also an incidental effect. For if the case is civil

> and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*."

See also *Penfield Co.* v. *S. E. C.*, 330 U. S. 585, 590 (1947):

> "Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he had refused to do,' *Gompers* v. *Bucks Stove & Range Co., supra*, p. 442, the remedy is one for civil contempt. *United States* v. *United Mine Workers*, 330 U. S. pp. 258, 303. Then 'the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.' *McCrone* v. *United States*, 307 U. S. 61, 64."

There is a tendency to think of a conditional civil contempt order as a milder exercise of official power than an unconditional punishment for criminal contempt, because the defendant can always escape the force of the order by complying with it. That is what makes tolerable the omission, from civil contempt proceedings, of many of the procedural safeguards with which criminal proceedings are hedged about, including the necessity of adjudicating the punishment once and for all rather than retaining jurisdiction to alter or extend the imprisonment from time to time. (Compare *In re Bradley*, 318 U. S. 50 (1943).)

But the civil contempt power can in some cases bear upon a defendant even more heavily than its criminal

counterpart; and it has an inherent limitation of its own which serves to minimize the harm that might otherwise result from its abuse. Since the power exists only for the purpose of enabling the court to help a party litigant get his legal rights, it terminates when—by lapse of time or otherwise—those rights disappear. Thus, in *Gompers* v. *Bucks Stove & Range Co., supra,* a civil contempt commitment for disobedience of a labor injunction was set aside because the main injunction suit had come to an end, the Court saying (221 U. S. at p. 451):

> "But the very amplitude of the [civil contempt] power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper.
>
> • • • • • •
>
> "When the main case was settled, every proceeding which was dependent on it, or part of it, was also necessarily settled—of course without prejudice to the power and right of the court to punish for contempt by proper proceedings. *Worden* v. *Searls,* 121 U. S. 27."

In the field of legislative investigations, this principle has the effect of disabling the legislature to continue a civil contempt commitment after the end of the session during which the commitment takes place. *Anderson* v. *Dunn,* 6 Wheat. 204, 230-231 (1821):

> "The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?
>
> "Analogy, and the nature of the case, furnish the answer:
>
> " 'The least possible power adequate to the end proposed;' which is the power of imprisonment. • • • And even to the duration of imprisonment a

> period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment."

An exception has been recognized in the case of *continuing* legislative bodies such as the United States Senate. *McGrain* v. *Daugherty*, 273 U. S. 135, 181 (1927). But, as noted above, the New Hampshire legislature is not such a body.

Nor is the limitation avoided by the fact that the state legislature has enlisted the aid of the Superior Court in enforcing compliance with its subpoenas. When the court so acts in aid of a purely legislative investigation it exercises legislative power, and the constitutionality of its acts must be appraised on that basis. See *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226 (1908), where the Court (per Holmes, J.) said:

> "Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. §720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed *sub nom. McNeill* v. *Southern Ry. Co.*, 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348."

We respectfully submit that the due process clause forbids the continuation of a commitment for civil contempt, in a floating status, after the substantive proceeding to which it was ancillary has disappeared or has ceased to have lawful justification. Were the law otherwise, a recalcitrant witness in a civil or criminal litigation could

be imprisoned for life even though the case itself had long since been settled or decided.

Imprisonment cannot constitutionally be inflicted unless it has an appropriate relationship to the effectuation of some public purpose. Whether or not it was reasonable, as an initial proposition, to suppose that appellant's conscientious principles could and would be broken by imprisonment, and that the desired information could thus be obtained, there is certainly no basis for continuing the coercive effort after the asserted legislative need for the information has come to an end.

III. Imprisonment for fidelity to conscientious and religious scruple, without a showing of compelling public need, is a cruel and unusual punishment.

Even if the Court were to be of the opinion that the Constitution does not forbid appellee, as agent of the New Hampshire legislature, from publicizing the names of persons whom he considers to be dangerous by reason of their associations, it does not follow that appellant can rightly be compelled to become his partner in the deed. Whether the exposure of these people is desired for punitive purposes or not, no one denies that it will hurt them. And appellant asserts a religious and conscientious scruple against becoming an instrument to that end. The question is whether the state's interest in obtaining the names is sufficiently substantial to justify the overriding of this scruple.

Consider what appellant is called upon to do. As director of the camp he issued a general invitation to people of all races and persuasions to come there for discussion of a pressing public problem. Although he had a constitutional right to invite them, and they had a constitutional right to come, it now appears that he has thereby jeopardized their safety.

There is no reason to doubt the sincerity of appellant's conviction that disclosure of the names would be a breach of religious obligation. But even apart from the requirements of religion there is a moral obligation to protect those whom one has placed in a position of peril. We suggest that the Court itself has felt the force of this obligation when called upon to defend those pursued by the state because of their reliance on the school segregation decision. *N. A. A. C. P.* v. *Alabama* and *Bates* v. *Little Rock, supra.* Recognition of such an obligation is manful and right.

We are not now dealing with a situation where the public authorities have reason to believe that some act has been committed which is or could be made unlawful, and are seeking to confirm or deny that belief. The state hungers after the names of these guests only because of their contact with appellant and the camp. In such circumstances the cruelty and arbitrariness of compelling the disclosure is particularly clear.

Coercive imprisonment of the conscientiously objecting witness either will achieve its purpose or it will not. If it does, he is punished for having exercised his constitutional right of peaceable assembly, the substance of the punishment being the knowledge that he has helped to harm innocent people whom he had a moral obligation to protect—a knowledge he will have to live with for the rest of his days. The surer he is that the assembly was innocent, the greater his shame at exposing its participants. The severity of his punishment is thus inversely related to the public benefit which might result from the disclosure. The emptier the public need, the harsher the sanction.

If the witness elects to follow the dictates of his conscience—and history shows that men have gladly gone to the stake rather than yield their convictions—he is jailed. His imprisonment serves no public purpose, for the coercive aim is not achieved. The only effect is to punish him for

faithful adherence to the requirements of morality as he understands them.

For more than eight months now, appellant has been held in close indoor confinement in the Merrimack County Jail—a much more severe hardship, incidentally, than would result from a like term in a penal institution, where exercise, sunlight, companionship and a job are ordinarily allowed even to hardened inmates. We say that to keep a man in jail for a year in the obviously vain hope that he may thereby be induced to abandon his principles is *punishment* whether or not it is called by that name, because it cannot reasonably be expected to serve any non-punitive objective. We say that such punishment is *cruel* because it is grotesquely disproportionate to any public harm which may be thought to have resulted from refusal of the names. And we say that it is *unusual* for the simple reason that, so far as we can discover, there is no modern precedent for the infliction of so severe a penalty upon fidelity to religious and conscientious principle. Appellant's confinement has already lasted longer than the seven months which this Court recently held to be the maximum reasonable commitment in a similar case. *Yates* v. *United States*, 356 U. S. 363 (1958).

The decision of this Court on the prior appeal cannot rightly be regarded as foreclosing the claim of cruel and unusual punishment which is raised on the present record. It is contrary to common sense and history to suppose that conscientious scruples, sincerely held, will yield to jail or the threat of jail. This Court therefore may well have assumed that, upon remand, the Superior Court would limit the commitment to a term sufficient to convince it of the futility of further imprisonment as a coercive device in this case. Instead, it has committed appellant to jail for a period of a full year—even if we ignore appellee's claim that the commitment order leaves open the possibility of *indefinite* extension (R. 153-155).

But if the decision on the prior appeal means that a conscientiously objecting witness can be imprisoned for punitive purposes even after it has become clear that the coercive purpose cannot be achieved, we respectfully submit that it is erroneous and should be limited or overruled.

The underlying principle involved in this case is the same as in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), overruling *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940). In the *Barnette* and *Gobitis* cases the issue was whether an affirmative act—the flag salute—could be constitutionally required of children asserting a conscientious scruple against that particular physical act. Here the question is whether the production of a list of names can be constitutionally required of a witness asserting conscientious scruples against that particular disclosure. But the difference is superficial; for in both the asserted justification for the requirement was the safety of the state, the basic question being the permissibility of achieving that end by overriding of the scruples of the individual citizen.

In the *Gobitis* case (decided on June 3, 1940, in the midst of the tension caused by the imminent fall of France and all it implied) this Court, by a vote of eight to one, found adequate justification for subordinating the rights of the individual. But it is noteworthy and to the eternal credit of our institutions that on June 14, 1943, on "long reflection" (as two of the Justices who changed their opinion put it), this Court acknowledged the unsoundness of the *Gobitis* decision and by a vote of six to three flatly overruled it. By so doing who can now doubt that this Court rendered a service to the cause of liberty?

If in the *Barnette* case, decided in the midst of serious war, this Court considered that in requiring the flag salute from conscientious objectors, state authority had over-

stepped constitutional bounds, we ask: Upon what reasonable grounds can it be held constitutional in 1960 to punish a conscientious objector who has done no more than decline to disclose a list of guests against whom no charge has been brought or any real ground for suspicion shown?

On this branch of the argument of this appeal, we shall wish to invite the close attention of this Court to the current case of Dr. Linus Pauling, as illustrative of the evils which will gather around us unless some weight is given to the claim of conscience under such circumstances as are presented here. In respect of the constitutional issue involved, the *Pauling* case appears to be on all fours with this one, if it be assumed, as we do, that a state can constitutionally go no further than the Federal Government in trying to extract from a witness information which he refuses to disclose upon grounds of conscience.

Dr. Pauling is an eminent chemist who was awarded the Nobel Prize in chemistry in 1954 and who, believing that continuance of nuclear weapons tests would be dangerous to mankind, undertook to marshal the expressed opinion of scientists from many nations against such continuance. To do so he circulated a petition and for this purpose solicited the active aid of a considerable number of scientists in the United States. His efforts were successful, resulting in the signature by over 11,000 scientists from 49 countries of a petition, filed with the United Nations, against a continuance of the tests.*

On June 18, 1960 Dr. Pauling was served with a subpoena to testify before the Senate Internal Security Subcommittee. Pursuant to this subpoena Dr. Pauling appeared before the subcommittee on June 21, 1960, when he was

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* The facts of the *Pauling* case are taken from the New York Times of June 22, 1960, §1, pp. 1 and 14, and from the complaint in *Pauling* v. *Eastland*, filed August 4, 1960, in the United States District Court for the District of Columbia.

asked to produce the names of all the approximately 2,000 American scientists who signed the petition, the names of those to whom he had written asking assistance in his petition campaign, and the names of those who had circulated petitions. The ostensible reason given for these inquiries was to seek information as to possible "communist participation in, or support of a propaganda campaign against nuclear testing."

In reply to these inquiries, Dr. Pauling offered to supply the subcommittee with the names of the approximately 2,000 American scientists who had signed the petition (those names having previously been made public and being on file with the United Nations), and also to give the subcommittee the names of those to whom he had written to ask assistance "because," as he said, "people are not responsible for the mail they receive. The responsibility for sending out the letter is mine." But Dr. Pauling refused to comply with the demand for the names of those who had assisted him in circulating the petition, stating that this refusal was based upon "conscience, morality and justice," and that "no matter what assurances the subcommittee might give me, I am convinced that these names would be used for reprisals against idealistic, high-minded workers for peace."

This refusal was not accepted by the subcommittee, which directed Dr. Pauling to return before the subcommittee at a later date and then to supply the withheld information. If he persists in his refusal, the Senate will presumably imprison him by its own process or refer the case to the Department of Justice for criminal proceedings under 2 U. S. C. §192.

Dr. Pauling, like Dr. Uphaus, has been willing to testify freely as to his own acts and beliefs but has refused on

conscientious grounds to participate in the harmful exposure of people charged with no wrongdoing, who had by his invitation placed themselves in a position of peril. If the Cold War continues and intensifies it can be expected that similar demands for names will be made by zealous investigators, whether with good or bad motives, and that the names will be refused on the same conscientious grounds. Unless some constitutional barrier is erected to protect the right of associational privacy in this circumscribed but important area, quite a number of our most conscientious and distinguished citizens may soon be in confinement—or (and this could be still more dangerous from the public viewpoint) may withdraw from the arena of public affairs where their talents are so sorely needed.

Much is now being said as to the importance for our future of the "image" of the United States held by other peoples. This matter is properly stressed, since in the longer view and in the judgment of some of our wisest men and women, more may ultimately depend upon the impression that we make upon the rest of the world in respect of our genuine devotion to free institutions, than on additions to our stockpiles of nuclear weapons which are probably now sufficient virtually to destroy all human life. We hurt ourselves and dim the hopes of the whole world if we give the authoritarian countries a basis for deriding as empty words our professions of freedom and of respect for the individual conscience.

Conclusion.

The questions involved in this case are substantial and important. Fundamentally, the issue is whether government by the people will remain a living reality. The Court should take this opportunity to reaffirm and implement the ringing words spoken in its name by Mr. Justice Jackson

in *West Virginia State Board of Education* v. *Barnette*, *supra* (319 U. S. at p. 641):

> "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

Respectfully submitted,

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Appendix A.

Opinion of the Supreme Court of New Hampshire, March 31, 1960.

Merrimack,
No. 4829.

LOUIS C. WYMAN, *Attorney General*

v.

WILLARD UPHAUS.

Argued March 1, 1960.

Decided March 31, 1960.

PETITION, by the Attorney General under RSA 491:19, 20 for an order to compel compliance by the defendant with two subpoenas *duces tecum* served upon him in the course of a legislative investigation of subversive activities conducted by the Attorney General pursuant to resolutions appearing in Laws 1953, *c.* 307 and Laws 1955, *c.* 197.

The petition was originally heard on January 5, 1956, when the defendant was ordered to produce guest registrations at the New Hampshire World Fellowship Center at Albany, New Hampshire, for the 1954 and 1955 seasons. This was part of the information sought by the above-mentioned subpoenas. Upon his refusal to comply with this order he was found and adjudged in contempt and ordered committed until he should purge himself of his contempt. Pending transfer of his exceptions defendant was admitted to bail.

The defendant's exception to the above order was overruled by this court (*Wyman* v. *Uphaus*, 100 N. H. 436, 445) and the order of committal was held valid by the United

States Supreme Court. *Uphaus* v. *Wyman*, 360 U. S. 72. Thereafter a further hearing on this matter was held on December 14, 1959 before GRANT, J. who presided at the previous hearing. Defendant objected to the jurisdiction of the Court on statutory and constitutional grounds and made a motion to dismiss which was denied. At the conclusion of the hearing the Court made the following order: "The rulings and findings of January 5th, 1956 are affirmed, thus ruling that Willard Uphaus is found and adjudged in contempt of this Court. Willard Uphaus is ordered committed to the Merrimack County Jail and there to remain for one year from this date or until he purges himself of contempt, or until further order of Court."

The defendant's exception to the order of the Court was reserved and transferred.

LOUIS C. WYMAN, Attorney General (by brief and orally), *pro se*.

NIGHSWANDER, LORD & BOWNES and ROYAL W. FRANCE (of N. Y.) (MR. BOWNES orally), for the defendant.

JAMES C. CLEVELAND and HOWARD S. WHITESIDE (of Massachusetts) (MR. WHITESIDE orally) for Hugo DeGregory, *amicus curiae*.

WHEELER, J. The chief contention of the defendant is that the Superior Court was without jurisdiction to find him in contempt because the statute authorizing the investigation expired on June 30, 1957 by express provision of chapter 197, Laws 1955.

In determining the validity of this argument it is necessary to examine the legislative history in the field of subversive activities in order to ascertain the legislative intent with respect to investigations by the Attorney General.

In 1951 the Legislature enacted "An act relating to subversive activities," taking cognizance of a "World Communist movement under the domination of a foreign power" which by its methods "including treachery and

deceit, [infiltrates] into governmental and other institutions." Laws 1951, *c.* 193 (now RSA ch. 588).

In 1953 the Legislature adopted a joint resolution authorizing and directing the Attorney General "to make full and complete investigation with respect to violation of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state." Laws 1953, *c.* 307. This investigation was further extended on two occasions, the last enactment continuing it to June 30, 1957. Laws 1955, *c.* 197, and *c.* 340.

In 1957 the Legislature amended the original act of 1951 by enacting chapter 178 "An act relative to investigation of subversive activities," which among other changes inserted after RSA 588:8 the following new section: "588:8a Attorney General. At any time when the attorney general has information which he deems reasonable or reliable relating to violations of the provisions of this chapter he shall make full and complete investigation thereof and shall report to the general court the results of this investigation, together with his recommendations, if any, for legislation. In any investigation hereunder the attorney general or any duly authorized member of his staff is authorized to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers and documents and to administer such oaths, and to take such testimony and to make such expenditures within the funds provided as he deems advisable. The provisions of section 7 of this chapter shall be inapplicable to the investigation provided for herein and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes hereof."

The Legislature was then aware that the temporary legislation (chapter 307, Laws 1953) as extended would expire within two weeks and was presumably aware that the defendant's appeal was then pending. Neither the

statute which expired nor the 1957 statute just quoted contains any provision which would indicate that expiration should terminate pending proceedings. *Opinion of the Justices,* 89 N. H. 563, 565. See also, RSA 21:37 and *Lakeman* v. *Moore,* 32 N. H. 410. The series of statutory enactments on the subject of subversive activities indicates the legislative purpose to continue the Attorney General's authority to investigate subversive activities and not end it when his power expired under chapter 197, Laws 1955. No clearer indication of this is needed than the enactment of chapter 178, Laws 1957, effective June 14, 1957, establishing a permanent authority in the Attorney General two weeks before the date of expiration of his temporary authority. The Legislature has thus shown a live and continuous interest in this subject matter. The jurisdiction of the Trial Court under RSA 491:19, 20 to enter the committal order in this case remains unimpaired. *Opinion of the Justices, supra.*

The constitutionality of the act under which the State proceeded against the defendant (Const. Pt. I, *Art.* 37th) has heretofore been decided and no reason is presented sufficient to warrant re-examination of the subject. See *Nelson* v. *Wyman,* 99 N. H. 33.

Exceptions overruled: judgment and committal order affirmed.

All concurred.

Appendix B.

Opinion of the Supreme Court of New Hampshire, June 27, 1960.

Merrimack,
No. 4829.

WILLARD UPHAUS *v.* LOUIS C. WYMAN, *Attorney General*

Argued June 8, 1960.

Decided June 27, 1960.

MOTION, by the plaintiff seeking suspension of an order of the Superior Court entered on December 14, 1959, and affirmed by this court on March 31, 1960, committing him to jail for contempt, and for a further order that he be admitted to bail, pending application to the United States Supreme Court for review of the judgment of this court entered on March 31, 1960.

ORR & RENO, HUGH H. BOWNES, ROYAL W. FRANCE and LEONARD B. BOUTIN (both of New York) and LOUIS LUSKY and MARVIN H. MORSE (both of Kentucky) (MR. RENO orally), for the motion.

LOUIS C. WYMAN, Attorney General (by brief and orally), opposed.

PER CURIAM. The plaintiff's motion alleges that he now proposes to seek review by the United States Supreme Court of the decision of this court handed down on March 31, 1960. *Wyman* v. *Uphaus,* 102 N. H. 461; 159 A. (2d) 160. It indicates that one basis for the review to be sought arises out of the expiration on June 30, 1957 of the legislation which directed the Attorney General "to determine whether subversive persons . . . are presently located within this state" (Laws 1953, *c.* 307; Laws 1955, *cc.* 197,

340), and the alleged imposition of limitations upon the previous authority of the Attorney General by the enactment on June 14, 1957 of RSA 588:8a. Laws 1957, *c.* 178. We are urged to suspend the order of committal entered on December 14, 1959, so that review may be had before committal shall end.

The statutory changes thus relied upon occurred before this case was remanded to this court following vacation of its earlier judgment by the United States Supreme Court on October 14, 1957. *Uphaus* v. *Wyman*, 355 U. S. 16. In November 1957, the plaintiff, in this court, opposed reinstatement of the judgment (*Wyman* v. *Uphaus*, 101 N. H. 139), and in November 1958, before the United States Supreme Court, argued his appeal from the reinstated judgment which was affirmed on June 8, 1959. *Uphaus* v. *Wyman*, 360 U. S. 72.

Our opinion of March 31, 1960, did not turn upon any holding that RSA 588:8a provided an extension of the legislative investigation first authorized in 1953. The plaintiff stands committed for refusal, while Laws 1955, *c.* 197 was still in effect, to comply with an order entered prior to enactment of RSA 588:8a.

Between January 5, 1956 and December 14, 1959, the plaintiff was at large upon bail. See *Wyman* v. *Uphaus*, 100 N. H. 436, 438. Yet the issues relied upon to support the review now to be sought although available to the plaintiff after June 1957, were not presented in the pending proceedings at any time, until first advanced before the Superior Court on December 14, 1959, the day on which the order of committal was entered. Other issues presented by the motion have been briefed and argued many times by competent counsel who have ably protected the plaintiff's rights.

This case has been repeatedly before the courts of this state and the United States Supreme Court, since 1954. See *Wyman* v. *Uphaus*, 100 N. H. 1; *Wyman* v. *Uphaus*, 100 N. H. 436; *Uphaus* v. *Wyman*, 355 U. S. 16; *Uphaus* v. *Wyman*, 356 U. S. 925, 965; *Wyman* v. *Uphaus*, 101 N. H. 139; *Uphaus* v. *Wyman*, 360 U. S. 72; *Wyman* v. *Uphaus*,

102 N. H. 324; *Wyman* v. *Uphaus*, 102 N. H. 461, 159 A. (2d) 160.

An examination of the pending motion in the light of the entire history of the case convinces us that there is no occasion to grant the relief sought.

Motion denied.

Appendix C.

New Hampshire Laws, 1953.

CHAPTER 307.

JOINT RESOLUTION RELATING TO THE INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Resolved by the Senate and House of Representatives in General Court convened:

That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state. The attorney general is authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable. He may authorize any member of his staff to conduct on his behalf any part of the investigation herein provided for and in such event and for such purposes any member so authorized shall have all of the powers herein granted to the attorney general.

For the purposes of this resolution, the attorney general or any duly authorized member of his staff is authorized to sit and act at such times and places during this session of the 1953 legislature, recess and adjourned periods, and to employ such attorneys, experts, clerical and other assistance as may be required, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, and to administer such oaths, to take such testimony and to make such expenditures within the limitations authorized herein as he deems advisable. The provisions of section 7 of chapter 193 of the Laws of 1951 shall be inapplicable to the investigation provided for herein, and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes of this resolution.

The attorney general is directed to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates violations thereof, and he shall report to the 1955 session on the first day of its regular session the results of this investigation, together with his recommendations, if any, for necessary legislation. There is hereby appropriated for the expenses of this investigation the sum of ten thousand dollars which shall include the cost of printing such report as is provided for by this resolution and shall be expended under the direction of the attorney general, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws. The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropirated.

[Approved June 17, 1953.]

New Hampshire Laws, 1955.

CHAPTER 340.

JOINT RESOLUTION RELATIVE TO CONTINUED DUTIES OF THE ATTORNEY GENERAL.

Resolved by the Senate and House of Representatives in General Court convened:

THAT the attorney general is hereby authorized and directed to continue the investigation authorized by chapter 307 of the Laws of 1953 in form, manner and authority as therein provided for the period from January 1, 1955 to April 30, 1955, and for the purposes hereof the provisions of said chapter 307, except as otherwise herein provided, are hereby continued in full force and effect for the additional period herein mentioned.

[Approved January 13, 1955.]

CHAPTER 197.

AN ACT RELATIVE TO INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Be it enacted by the Senate and House of Representatives in General Court convened:

1. *Subversive Investigation.* The investigation of subversive activities by the attorney general provided for by chapter 307 of the Laws of 1953, as continued by a resolution approved January 13, 1955, is hereby continued in full force and effect, in form, manner and authority as therein provided for the further period until June 30, 1957. The attorney general shall report to the general court of 1957 the results of this further investigation together with his recommendations, if any, for necessary legislation. He may at any time during said period temporarily or permanently conclude his investigation hereunder if, in his opinion, no useful public purpose would be served by continuation of the investigation. There is hereby appropriated for the expenses of this continued investigation a sum not to exceed forty-two thousand five hundred dollars, which shall include the cost of printing such report as is provided for hereby, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws (section 12, chapter 7, RSA). The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

2. *Takes Effect.* This act shall take effect upon its passage.

[Approved June 14, 1955.]

CHAPTER 178.

AN ACT RELATIVE TO INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Be it enacted by the Senate and House of Representatives in General Court convened:

178:1 *Subversive Activities.* Amend RSA 588:8 by striking out said section and inserting in place thereof the following: *5:88 Grand Jury Inquiries.* The superior court, when in its discretion it appears appropriate, or when informed by the attorney general that there is information or evidence of the character described in section 2 of this chapter to be considered by the grand jury, shall charge the grand jury to inquire into violations of this chapter for the purpose of proper action.

178:2 *Investigations.* Amend RSA 588 by inserting after section 8 the following new section: *588:8-a. Attorney General.* At any time when the attorney general has information which he deems reasonable or reliable relating to violations of the provisions of this chapter he shall make full and complete investigation thereof and shall report to the general court the results of this investigation, together with his recommendations, if any, for legislation. In any investigation hereunder the attorney general or any duly authorized member of his staff is authorized to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers and documents and to administer such oaths, and to take such testimony and to make such expenditures within the funds provided as he deems advisable. The provisions of section 7 of this chapter shall be inapplicable to the investigation provided for herein and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes hereof.

178:3 *Appropriation Extended.* Any balance of the funds provided by 1955, 197:1 shall not lapse, but shall be a continuing appropriation for the use of the attorney general in any investigation under RSA 588:8-a

178:4 *Takes Effect.* This act shall take effect upon its passage.

[Approved June 14, 1957.]

[Effective date June 14, 1957.]

New Hampshire Revised Statutes Annotated.

PROCEEDINGS FOR CONTEMPTS BEFORE OTHER BODIES.

491:19 *Petition.* Whenever any official or board is given the power to summon witnesses and take testimony, but has not the power to punish for contempt, and any witness refuses to obey such summons, either as to his appearance or as to the production of things specified in the summons, or refuses to testify or to answer any question, a petition for an order to compel him to testify or his compliance with the summons may be filed in the superior court, or with some justice thereof.

491:20 *Procedure.* Upon such petition the court or justice shall have authority to proceed in the matter as though the original proceeding had been in the court, and may make orders and impose penalties accordingly.